

NEBRASKA DEPARTMENT
OF INSURANCE

AUG 21 2003

BEFORE THE DEPARTMENT OF INSURANCE
STATE OF NEBRASKA

FILED

STATE OF NEBRASKA)	
DEPARTMENT OF INSURANCE,)	FINDINGS OF FACT, CONCLUSIONS
)	OF LAW, RECOMMENDED ORDER
PETITIONER,)	AND ORDER
)	
VS.)	CAUSE NO. A-1505
)	
MARK PORTER,)	
)	
RESPONDENT.)	

This matter came on for hearing on the 13th day of August, 2003, before Martin W. Swanson, a hearing officer duly appointed by the Director of the Nebraska Department of Insurance. The Nebraska Department of Insurance ("Department") was represented by its attorney, Eric Dunning. Mark Porter (Respondent), was present and was not represented by an attorney. The proceedings were tape recorded by Sue Kuzelka, a licensed Notary Public. Evidence was received, and the matter was taken under advisement. As a result of the hearing, the hearing officer makes the following Findings of Fact, Conclusions of Law, and Recommended Order.

FINDINGS OF FACT

1. Respondent is a licensed resident Nebraska insurance agent whose current registered address with the Department is 11330 "Q" Street, Suite 14, Omaha, Nebraska 68137.
2. The Department is the agency of the State of Nebraska charged with licensing insurance agents and brokers.
3. Respondent received notice of this hearing by virtue of his personal appearance.
4. On or about January 4, 1999, Respondent solicited from Mary Chickinell an annuity application from American Life and Casualty Insurance Company, which was ultimately issued as

0N545584 for a premium of \$8,895. In response to the question on the application of whether "you have any reason to believe that replacement of existing insurance may be involved," Respondent marked "no." Respondent included his name and signature which denoted that he was the issuing agent. Respondent admitted that this annuity was funded from the surrender of Beneficial Standard Policy #00128587.

5. On or about January 4, 1999, Respondent solicited from Mary Chickinell an annuity application from National Western Life Insurance Company, which was ultimately issued as 0100917852 for a premium of \$222,655. In response to the question on the application of whether "Will this annuity replace any existing insurance or annuities in this or any other company?" Respondent did not provide a response. Respondent included his name and signature on the application as the issuing agent. This annuity was funded from the surrender of Beneficial Standard Policy #139298, 114677, 133011, 127784, and 128586. Respondent agreed that policy number 0100917852 should have been considered a replacement policy.

6. On or about August 6, 1999, Respondent solicited from Mary Chickinell an annuity application from National Western Life Insurance Company, which was ultimately issued as 0100931848 for a premium of \$43,884. In response to the question on the application of whether "Will this annuity replace any existing insurance or annuities in this or any other company?" the response from Respondent was "no." Respondent's name and signature appeared on the application as the issuing agent. This annuity was funded from the surrender of American Life and Casualty Insurance Company policy #0JN714069. Respondent admitted that policy number 0100931848 should have been considered a replacement.

7. On or about May 15, 1997, Respondent solicited from Wilmer Griffin an annuity application from Beneficial Standard Life Insurance Company for a premium of \$52,667. In

response to the question on the application of whether "Will this annuity replace any existing annuity or insurance contract?" the response from Respondent was "no." Respondent included his name and signature on the application as the issuing agent. The annuity was funded with a check on First National Bank of Omaha account; check number 4148 signed by Frances Griffen that stated "Annuity Rollover" on the memo line.

8. On or about May 15, 1997, Respondent solicited from Frances Griffin an annuity application from Beneficial Standard Life Insurance Company for a premium of \$31,505.81. In response to the question on the application of whether "Will this annuity replace any existing annuity or insurance contract?" the response from Respondent on the form was "no." Respondent's name and signature appeared on the application as the issuing agent. This annuity was funded with the proceeds of the total surrender of American Investors policy number 153237 and a partial withdrawal from National Western policy 100768885.

9. On or about October 10, 2000, Respondent solicited from Frances Griffin an annuity application from Beneficial Standard Life Insurance Company for a premium of \$18,208.37. In response to the question on the application of whether "Will this annuity replace any existing insurance or annuities in this or any other company?" Respondent's reply was "no." Respondent included his name and signature on the application as the writing agent. This annuity was funded by the total surrender of an annuity issued by National Western, policy number 010076885.

10. On or about October 10, 2000, Respondent solicited from Wilmer Griffin an annuity application from Beneficial Standard Life Insurance Company for a premium of \$85,722.50. In response to the question on the application of whether "Will this annuity replace any existing insurance or annuities in this or any other company?" the response filled in by Respondent was "no." Respondent's name and signature appeared as the writing agent on the form. The annuity

was funded by the total surrender of an annuity issued by National Western, policy number 0110753499.

11. On or about October 10, 2001, Respondent solicited from Wilmer Griffin an annuity application from Beneficial Standard Life Insurance Company for a premium of \$16,994.49. In response to the question on the application of whether "Will this annuity replace any existing insurance or annuities in this or any other company?" Respondent checked the box "no." Respondent's name and signature appeared as the writing agent on the form. The annuity was funded by the total surrender of an annuity issued by National Western, policy number 0100768886.

12. The Nebraska Department of Insurance conducted a market conduct examination in March of 2002. During the course of that examination, the records of the Respondent and his company, the Mark Porter Agency, were reviewed. As a result of the market conduct examination it was discovered that Respondent failed to retain records of several transactions, including the August 6, 1999 annuity transaction (see paragraph six of this order), both October 10, 2000 annuity transactions (see paragraphs nine and ten of this order), and the October 10, 2001 annuity transaction (see paragraph eleven of this order).

13. As part of the market conduct examination, Respondent responded to various questions from the Department of Insurance as required by law. As noted above, Respondent admitted that in several instances he should have denoted that these new annuities were "replacements" but that he failed to do so. Additionally, Respondent, in written correspondence with the Nebraska Department of Insurance and during the hearing, admitted that his files were not in proper order according to the statutes. In one instance, Respondent wrote to John Koenig, a

market conduct examiner with the Nebraska Department of Insurance that "the filing system is inadequate according to statute."

14. The market conduct report (report) revealed, without objection from Respondent, that Respondent's agency had been in operation since 1988. According to the report, Respondent does not keep formal accounting records, client listings and no computer records that list the policies for each insured. Respondent did not retain commission statements from the various companies where he transacts his business. According to the report, and confirmed by Respondent's testimony, Respondent has approximately forty-five clients, of which, ten of those files were inactive and five of said files belonged to family members. Thus, out of the forty-five files, thirty files could be considered "active" for purposes of the report. According to Respondent's testimony, Respondent makes \$45,000 per year from the thirty active files. Respondent admitted in the report and at the hearing that he was not aware that a replacement notice would be needed for all annuity surrenders. Respondent also admitted as much during the hearing. Respondent also admitted to the investigators, according to the report, that he did not realize he needed to retain file documentation or copies of the various application. Once again, Respondent admitted during the hearing that "while ignorance of the law is no excuse" he did not realize that he was supposed to keep those matters in the file although he now asserts that he should.

CONCLUSIONS OF LAW

1. The Department has jurisdiction and control over the licensing of Respondent to sell insurance in the State of Nebraska pursuant to **Neb.Rev.Stat. §44-101.01** and **§44-4001 et seq.**
2. The Department has personal jurisdiction over Respondent.

3. The Respondent violated **Title 210 NAC 19 §006** and **Neb.Rev.Stat. §44-1524**.

That regulation requires that an insurance producer who initiates an annuity application obtain a signed statement by the applicant as to whether replacement of an existing annuity is involved in the transaction, obtain a signed statement as to whether the agent knows replacement is or may be involved in the transaction, and where a replacement is involved, the agent shall present to the applicant at the time of taking the application a "Notice Regarding Replacement" signed by the annuitant and the agent and left with the annuitant and obtain with or as part of the application, a list of all existing annuities to be replaced and properly identifying each insurer, annuitant, and contract number all of which must accompany the application and be submitted to the issuer. This regulation must be read, especially in this case, in conjunction with **Title 210 NAC 19 §0010.02** which states that "patterns of action by policyowners who purchase replacing policies from the same agent or broker, after indicating on applications that replacement is not involved, shall be deemed prima facie evidence of the agent's or broker's knowledge that replacement was intended in connection with the sale of those policies, and such patterns of action shall be deemed prima facie evidence of the agent's or broker's intent to violate this Rule." In this case, Respondent admitted, both in responses submitted to the Department of Insurance and during the hearing, that it was his belief that the surrendered policies did not need to be identified on the new annuity policies. His "belief" was misplaced. His conduct did not conform to the law. Respondent did not deny that he checked the relevant boxes in the forms "no" nor did he deny failing to file the necessary paperwork as required by the law. Nor did he deny that these were replacement policies. In fact, the evidence submitted clearly indicates that these were, in all instances, replacement policies. Moreover, the affidavit of Frances Griffin indicates that her and her husband's replacement policies were purchased with the proceeds of their former annuities and all of them were obtained via the

services of Respondent. The aforementioned regulations mandate that an agent must denote whether or not the annuity is a replacement policy and, if it is the same agent, then the failure to denote a replacement policy when it is a replacement policy is prima facie evidence of intent to violate the law. Respondent violated **Title 210 NAC 19 §006** in all eight instances listed in the Petition.

4. Respondent also violated **Neb.Rev.Stat. §44-5905(2)(b)(i)(B)**. The statute, dubbed the "Insurers Examination Act," requires that every company or person subject to the act shall retain market conduct records for four years following the completion of a transaction relating to the insurance business and affairs of such company or person. Clearly, an insurance producer, such as Respondent, is subject to this act. The market conduct examination was executed in March of 2002, less than four years from when the transactions alleged in the petition, occurred. Specifically, Respondent is charged with four instances of failing to keep adequate files within a four-year time frame. First, for the transaction with annuity number 0100931848 dated August 6, 1999. Second, for the annuity transaction that occurred on October 10, 2000. Third, for an annuity, 0110753499, with a transaction date of October 10, 2000. Finally, there was an annuity transaction on October 10, 2001. All of these transactions happened within a four-year time frame wherein all records were supposed to be kept by Respondent in the respective files of his clients. According to Respondent's own admission, both during the hearing and in responses to questions from the Department of Insurance, his filing system was inadequate and not in compliance with the statute. Marilyn Meier of the Nebraska Department of Insurance testified that the investigators had to reconstruct nearly every file in Respondent's office in order to perform the market conduct examination. In most instances, each file had two or three pieces of paper which is significantly below the normal average of the amount of relevant paperwork a file should contain. In others, the

files were even missing an application or an original policy. Those documents, which are in evidence in this matter, had to be obtained from the companies and from the annuitants themselves. Respondent failed, in the four instances charged, to comply with **Neb.Rev.Stat. §44-5905(2)(b)(i)(B)**.

5. For a violation of **Neb.Rev.Stat. §44-1524**, **Neb.Rev.Stat. §44-1534** provides that the powers vested in the director by the Unfair Insurance Trade Practices Act shall be additional to any other powers to enforce any penalties, fines, or forfeitures authorized by law with respect to the acts and practices defined and determined by such act to be unfair.

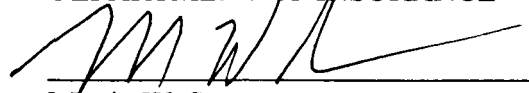
6. Under **Neb.Rev.Stat. §44-4059(1)(b)** the Director may impose a fine, suspend, or revoke an insurance producer's license if that person has violated any insurance law or has violated any rule, regulation, subpoena, or order of the director or of another state's insurance commissioner or director.

RECOMMENDED ORDER

Based on the Findings of Fact and Conclusions of Law, it is recommended that Respondent's Insurance Producer's License be suspended for a period of not less than two years effective immediately.

Dated this 19th day of August, 2003.

STATE OF NEBRASKA
DEPARTMENT OF INSURANCE



Martin W. Swanson
Hearing Officer

CERTIFICATE OF ADOPTION

I have reviewed the foregoing Findings of Fact, Conclusions of Law, and Recommended Order and hereby certify that the Recommended Order is adopted as the official and final Order of this Department in the matter of State of Nebraska, Department of Insurance vs. Mark Porter, Cause No. A-1505.

Dated this 21st day of August, 2003.

STATE OF NEBRASKA
DEPARTMENT OF INSURANCE



L. TIM WAGNER
Director of Insurance

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Findings of Fact, Conclusions of Law, Recommended Order, and Order was served upon the Respondent by mailing a copy to Respondent at 11330 Q Street, Suite 14, Omaha, Nebraska 68137, by certified mail, return receipt requested, on this 22 day of August, 2003.

